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BRIEF

No. 15-1204

IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMERICAN BAR ASSOCIATION[1]

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA") recommends that the Court hold that the Constitution requires periodic hearings at fixed time intervals for immigrants subject to mandatory detention under 8 U.S.C. § 1225(b) and 8 U.S.C. § 1226(c), or eligible to receive an initial bond hearing under 8 U.S.C. § 1226(a), to determine whether they pose either a flight risk or danger that would justify their continued detention, because prolonged detention without a further hearing offends the protections of the Due Process Clause. The ABA further recommends that the Court hold that the Constitution requires the Government, and not the detained immigrant, to bear the burden of proof at such individualized hearing.

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[1] Pursuant to Supreme Court Rule 37.6, the ABA states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the ABA, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Neither this brief nor the decision to file it reflects the views of any judiciary member associated with the ABA. The Court should not infer that any member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA is a voluntary, national membership organization of the legal profession. Its more than 400,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer associates in allied fields. As set forth more fully in its amicus brief previously submitted in this case (Br. 1-5), the ABA has based its judgment both on the law and on the experience of its diverse members in various contexts to work with lawmakers, administrators, and the courts to ensure that the detention of immigrant populations comports with due process requirements. The ABA incorporates its Statement of Interest as set forth in its original amicus brief on file herein.

SUMMARY OF THE ARGUMENT

The Due Process Clause of the Constitution places limits both on the Government's ability to detain individuals and on their period of detention. In enacting 8 U.S.C. §§ 1225(b) or 1226(c), Congress did not expressly provide any mechanism by which immigrants detained pursuant to these laws would be guaranteed protection against confinement for an excessive period. Likewise, Congress provided no express time period in which immigrants detained pursuant to 8 U.S.C. § 1226(a) would receive a timely bond hearing. To avoid the serious constitutional issues raised by these omissions, the ABA in its initial brief urged this Court to apply the canon of constitutional avoidance and interpret each statute in question as containing a reasonable time limit, by

which a neutral decision maker must provide an individualized hearing on flight risk and danger to a person detained pursuant to one of these three provisions. Were this Court not to rely on the canon, the ABA concludes that each of these statutes would violate the Due Process Clause as applied to the class members because the statutes otherwise permit prolonged, and potentially indefinite, detention without any individualized hearing on flight risk or danger.

Although the ABA takes no position as to the precise time at which the Government must provide an individualized hearing on the grounds for an immigrant's detention, it has drawn upon its membership's experience to offer guidance regarding the procedural elements required to ensure a timely and adequate hearing that satisfies due process principles. Based on multiple studies by various task forces in a range of matters concerning detained individuals, the ABA has concluded that at least two elements are essential to ensuring due process. First, the Government must bear the duty to justify the basis for detention. Second, to ensure the Government's duty is carried out in a timely manner, some outer time limit must be established for an individualized proceeding. The ABA notes that the approach adopted by the Court of Appeals complies with both of these principles.

Accordingly, and to ensure due process, the ABA urges that the Court direct the Government to provide an individualized administrative hearing within a fixed time period to determine whether the

immigrant's detention is justified based on flight risk or danger.

ARGUMENT

I. Although The ABA Recommends Employing The Doctrine Of Constitutional Avoidance, It Agrees That 8 U.S.C. §§ 1225(b), 1226(c) And 1226(a) Are Constitutionally Infirm As Applied To Class Members By Permitting Prolonged And Excessive Detention Without An Individualized Hearing

Congress did not expressly provide any mechanism for ensuring that immigrants detained pursuant to 8 U.S.C. §§ 1225(b) or 1226(c) are provided individualized hearings to test the basis for their detention before they are detained for excessive periods. Congress also did not provide any time period in which immigrants detained pursuant to 8 U.S.C. § 1226(a) may seek a subsequent bond hearing where their detention is prolonged. *See* 8 U.S.C. § 1226(a)(2)(A).

The Fifth Amendment's right to due process is incompatible with prolonged civil detention without an individualized hearing to determine flight risk or danger. *See* Resp. Br. at 17-19. This is true as applied to all "persons" within the United States, including noncitizens, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), and as applied to deportation proceedings. *See, e.g.*, Petr. Br. at 29, 47 (recognizing Respondents' entitlement to due process protections); *Reno v. Flores*, 507 U.S. 292, 305-306 (1993). The ABA has therefore urged this Court to apply the

canon of constitutional avoidance and interpret each statute in question as containing a reasonable time limit within which a neutral decision maker must provide an individualized hearing to test whether detention is justified based on flight risk or danger. As set forth in the ABA's original amicus brief in this matter (Br. 10-11), interpreting the statutes otherwise "would raise serious constitutional problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *see also Zadvydas*, 533 U.S. at 695. The ABA favors applying the doctrine of constitutional avoidance over expressly invalidating the entirety of, or portions of, these acts of Congress both out of respect for a coordinate branch of Government and to give Congress greater latitude to amend its legislation.

The Court's request for supplemental briefing, however, appears to seek the views of interested parties as to whether some or all of the three mandatory detention statutes at issue violate the Constitution. The ABA believes that each of the statutes does violate the Constitution because they all suffer from the same fundamental infirmity: absent a saving interpretation, each statute could, and has been, interpreted in a manner that results in the prolonged, and potentially indefinite, detention of individuals with no timely individualized hearing to determine the basis for their detention.

Government detention violates due process "unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and 'narrow' non-punitive 'circumstances,' where a special justification, such as

harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (emphasis and citations omitted). Civil detention extending beyond, or not related to, its "special justification" runs afoul of due process. *See id.* (holding that detention is improper when it no longer bears a reasonable relation to the purpose for which the individual was committed); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that, where detention's goal is no longer attainable, detention does not comply with due process); *Demore v. Kim*, 538 U.S. 510, 530 (2003) (finding detention permissible for the "limited period of his removal proceedings"). Each statute at issue is infirm because each could be, and has been, interpreted to permit indefinitely prolonged detention of individuals without any proceeding to determine that their detention remains reasonably related to its purpose.

II. The ABA's Experience Demonstrates Temporal Guidelines Are Required To Safeguard Due Process Rights

The ABA has extensive experience and understanding of the practical results of various enforcement regimes in securing the constitutional rights of detainees in numerous contexts. These include criminal proceedings, as well as various forms of civil proceedings such as involuntary commitments, juvenile detention, and immigration proceedings. The conclusions of ABA task forces that have studied these areas were the results of separate endeavors, by separate committees, at different times. Yet all of them came to the same conclusion—

that the best method for ensuring that timely review is granted is to set an outer time limit and an appropriate method of review based on the type of detainee and other relevant factors, and that such review must be conducted within that time limit. Their conclusions, which have been adopted by various courts, are reflected in decisions such as this Court's holding in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

The ABA has not taken a position as to the specific point in time by which an individualized hearing must take place to ensure that these statutes satisfy constitutional norms, but agrees that the approach adopted by the Court of Appeals complies with two key principles that are essential to satisfying due process. First, the duty must rest with the Government to justify the basis for detention; second, to ensure this duty is carried out in a timely manner, some outer time limit must be established for an individualized proceeding.

A. The Burden Rests With The Government To Establish Grounds For Detention

This Court has consistently placed the burden on the Government, not the individual detained, to prove the justification for continued detention. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 86 (1992); *Addington v. Texas*, 441 U.S. 418, 431-33 (1979); *County of Riverside*, 500 U.S. at 56. This is especially true in situations such as this, in which the individual detained has no right to appointed counsel, is confined in a manner that restricts access

to other resources, and is part of a uniquely vulnerable population.

B. An Outer Time Limit For An Individualized Hearing Ensures That Due Process Rights Are Protected

Relying on the input of prosecutors, defense attorneys, jurists, and distinguished experts, the ABA has repeatedly concluded that immigrant detainees must be afforded a timely review of the Government's basis for determining that the detainee presents a threat to public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision.[2] This conclusion reflects the ABA's extensive experience evaluating the effects of various immigration detention review proceedings, as well as standards to protect a detainee's constitutional rights in related contexts. The basis for this determination is set forth at length in the ABA's amicus brief and is reflected in the ABA's Civil Immigration Detention Standards ("Detention Standards"), which implement principles of justice, humane treatment, and due process.[3]

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[2] Brief of American Bar Association as *Amicus Curiae* in Support of Respondents, at p. 12, nn. 3-4 (quoting specific provisions from the ABA Civ. Immigr. Det. Standards, 12A102, adopted August 2012, as amended in August 2014 by Res. 111, *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf).

[3] *See* Detention Standards, Acknowledgements.

The ABA's experience in the criminal justice and mental health contexts also lends support to this principle. The ABA's Criminal Justice Standards on Pretrial Release ("Pretrial Release Standards"), for example, call for a detained criminal defendant to be granted a prompt first appearance no later than 24 hours after the initial arrest, during which time the judicial officer must make a decision as to pretrial release based on a specific determination of flight risk or threat to the community.[4] This time frame comports with the nature of the detention, the status of the detainee, and the failure of less specific limits to ensure prompt probable cause review. The ABA has likewise endorsed the need for temporal boundaries for proceedings to evaluate the need for continued pretrial detention,[5] determine competence to stand trial,[6] and decide whether a speedy trial has been accorded.[7]

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[4] ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007), Standards 10-4.1, 10-5.3, *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

[5] Pretrial Release Standards, Standard 10-5.12 (allowing the defendant to file a motion with the court requesting that it re-examine the release decision, and requiring the parties to file a status report when the defendant has been detained for more than 90 days without a court order).

[6] ABA Criminal Justice Standards on Mental Health, Standard 7-4.12, adopted August 2016, *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf (prescribing that a defendant's competence should be "periodically redetermined by the court" upon the occurrence of significant events and at

The ABA's Criminal Justice Standards on Mental Health ("Mental Health Standards") also endorse temporal limits for administering civil-commitment detention in compliance with the Due Process Clause. Those Standards condition civil commitment following a not guilty verdict by reason of insanity on the detaining authority preparing a detailed evaluation report within 30 days after the verdict.[8] This temporal guideline ensures that the government has timely stated its justification for commitment. The Standards further call for the prosecutor to move for a commitment hearing within five days thereafter, and direct that a hearing be held within 15 days of the filing of the evaluation

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periodic intervals of "30 days, 90 days, 180 days, and every 180 days thereafter"); *see also id.* at Standard 7-4.14 (requiring a hearing to determine whether the defendant is "unrestorable" within a set time after the defendant was deemed incompetent).

[7] ABA Criminal Justice Standards on Speedy Trial and Timely Resolution of Criminal Cases (3d ed. 2006), Standard 12-2.1(b), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/speedy_trial.authcheckdam.pdf ("The presumptive speedy trial time limit for persons held in pretrial detention should be [90] days from the date of the defendant's first appearance in court after the filing of a charging instrument. The presumptive limit for persons who are on pretrial release should be [180] days from the date of the defendant's first appearance in court after either the filing of any charging instrument or the issuance of a citation or summons. Shorter presumptive speedy trial time limits should be set for persons charged with minor offenses.").

[8] Mental Health Standards, Standard 7-7.3.

report.[9] As in the immigration context, these temporal guidelines protect the due process rights of the vulnerable populations subject to detention, and properly place the burden on the government to justify the deprivation of liberty.

The ABA's experience thus reflects that the need for a fixed time limit in which to conduct a proceeding to justify continued detention applies across comparable categories of detainees. The Court's jurisprudence in other contexts confirms the need for such bright-line rules. *See, e.g., County of Riverside*, 500 U.S. at 56; *Cheff v. Schnackenberg*, 384 U.S. 373, 380-81 (1966). This approach works equally well to fulfill due process requirements regarding detention across the immigration, criminal prosecution, or involuntary civil commitment contexts. In each case, the liberty interest is sufficiently important to warrant meaningful review, the competing government interests are similar, and immigrants are as limited as these other groups—if not more so—in their ability to compel compliance with due process rights.

III. Habeas Is Inadequate To Ensure That Detained Immigrants Have A Meaningful Opportunity To Test The Reasonableness Of Their Detention

The Court has also solicited the views of interested parties regarding whether the approach adopted by the Court below is constitutionally required. The ABA's experience addressing case-by-

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[9] *Id.*

case determinations in this and related contexts confirms that some form of individualized administrative hearing must be conducted within a reasonable period of time.

The ABA's experience in multiple contexts has shown that, without a fixed deadline, governments lack necessary incentives to devote limited resources to providing timely proceedings. This may result in the government unintentionally, or in some cases deliberately, delaying review, and adopting strategies that have the actual and expected effect of significantly delaying or effectively eliminating review. These strategies may include requiring confined, impoverished, and non-English speaking or potentially illiterate individuals to initiate proceedings themselves, imposing the burden to prove government error on such individuals, or establishing review within a perennially sluggish and overcrowded adjudicative process.

The ABA's original brief (Br. 25-27) described how the complexity of habeas proceedings presents an insurmountable barrier to many detained immigrants, who would thereby be effectively denied any opportunity for review. Habeas is ill-suited to this particular context because it imposes a heavy burden on detained immigrants, who often are unrepresented and do not have the language comprehension and other skills required to understand the complexity of the federal court system. Habeas procedures and crowded federal dockets therefore inevitably compound—rather than relieve—the period of prolonged detention.

If the Court chooses to fashion a different approach from the Ninth Circuit, the ABA suggests that due process requires at the very least that some specific elements be retained. Specifically, the Court should require (i) that the Government provide a hearing directly in immigration court—i.e., without requiring detainees to file habeas petitions to obtain that hearing—and (ii) that the hearing occur within some specified period of time. In *Zadvydas*, this Court recognized that, after six months, if a detained immigrant provided good reason to believe that there is no significant likelihood of removal "in the reasonably foreseeable future" (such significant likelihood of removal being the underlying justification for the detention in the subject statute), the Government must respond with evidence sufficient to rebut that showing. 533 U.S. at 701. In other words, once the underlying justification for the detention ceases, the detention must end. *Id.*

The ABA recommends adopting a similar approach here, and requiring an individualized hearing to determine whether the immigrant's continued detention would offend the protections of the Due Process Clause. Compared to habeas relief, such a hearing would better comport with the findings of the ABA that the only way to ensure fair and timely review is through "a prompt hearing before an Immigration Judge for any alien in removal proceedings who is denied release with or without bond, including meaningful administrative review and judicial oversight." ABA Report 197E 1, adopted February 2006, *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107e.authcheckdam.pdf. This

hearing would not require immigrants to resort to the inadequate, lengthy, and burdensome habeas process to obtain an eventual determination of whether their length of detention has become unreasonable.

Experience shows that temporal guidance on the length of detention is ineffective without an automatic hearing. Otherwise, a judicial directive limiting detention to a "reasonable" period cannot defeat the proven tendency of the immigration system to let immigrants languish in detention. For example, although the Third Circuit held in *Diop v. ICE/Homeland Security*, 656 F.3d 221, 231, 233 (3d Cir. 2011), that a hearing under § 1226(c) would be necessary after a "reasonable" period of time, experience shows that immigrants were forced to continually rely on the faulty backstop of habeas corpus simply to obtain the hearing that the Government had been ordered to provide in a reasonable time. In *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d Cir. 2015), it took the immigrant petitioner three years after detention to finally obtain an appellate court order directing a bond hearing based on his habeas petition. *See id.* at 470-71; *see also* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 Hastings L.J. 363, 390, 397-400 (2014) (reviewing Third Circuit mandatory detention case law and concluding that district courts have taken "inconsistent approaches to similar facts"). Such delays will likely remain widespread in the absence of an automatic hearing, and will continue to confound enforcement of detainees' due process rights.

Because the Government has demonstrated that it cannot prevent unconstitutional prolonged detentions in a system that relies on habeas review, the ABA believes due process requires an automatic hearing before an immigration judge within a fixed period of time. Immigration judges familiar with these cases are qualified to make such determinations. Indeed, immigration judges are already entrusted to determine whether an individual is "properly included" under the mandatory detention statute. *See* 8 C.F.R. § 1003.19(h)(2)(ii). Immigration judges and the Board of Immigration Appeals routinely hear claims by immigrants that they are not properly subject to the terms of the statute, and nothing precludes the immigration courts from hearing such matters. The ABA would therefore urge that any modifications of the Ninth Circuit's remedy at least provide an automatic hearing to determine whether continued mandatory detention has become unreasonable.

CONCLUSION

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The ABA appreciates the opportunity to provide its insights to assist the Court in determining the scope of the Due Process Clause's carefully limited exception and the procedures required to ensure compliance with the Due Process Clause. For the foregoing reasons, amicus ABA urges the Court to affirm the decision below.

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